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No. 98-1074

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1998

CITY OF SANTA BARBARA,
Petitioner,

v.

VICKIE L. EDWARDS AND KATHLEEN ROSE MCCAULLEY,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether this Court should review a district court order where that order is still pending on appeal in a separate proceeding in the court of appeals, that appeal was not part of the decision for which petitioner seeks certiorari, and petitioner has not purported to petition for certiorari before judgment in the separate appeal which does address the order in question?

2. Whether an ordinance imposing "floating bubble zones" on public sidewalks is unconstitutional?

3. Whether an ordinance imposing restrictions on "[a]ll expressive and symbolic conduct, whether active or passive, which shall include, but not be limited to, protesting, picketing, distributing literature, and engaging in oral or silent protest, education or counseling activities," on portions of public sidewalks, is unconstitutional?

4. Whether the distinction in an ordinance between "words or symbols such as or similar in effect to 'stop' . . . or 'leave me alone,'" on the one hand, and "statements of opinion or disagreement," on the other, is an unconstitutionally vague basis for triggering a governmentally enforced audience veto on speech in traditional public fora?

PARTIES

The City of Santa Barbara, petitioner in No. 98-1074, is the respondent in No. 98-1025. Vickie Edwards and Kathleen McCaulley, respondents in No. 98-1074, are the petitioners in No. 98-1025.

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No. 98-1074

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BRIEF IN OPPOSITION

INTRODUCTION

The underlying litigation in this case involves a constitutional challenge to two separate provisions of an ordinance of the City of Santa Barbara, California. One provision imposes bans on "demonstration activity" along stretches of the public sidewalks adjacent to any "health care facility" or "place of worship." This "demonstration ban" is addressed in the petition for certiorari docketed as No. 98-1025 in this Court. A second provision imposes floating speech-free bubble zones within 100 feet of any "health care facility" or "place of worship." That provision is addressed in the petition for certiorari -- opposed herein -- docketed as No. 98-1074.

The district court preliminarily enjoined the "demonstration ban" in its entirety, Pet. App. E in No. 98-1025, but the Ninth Circuit reversed, Pet. App. A in No. 98-1025.[1] Accordingly, the petitioners in No. 98-1025 are plaintiffs Vickie Edwards and Kathleen McCaulley.

The "floating bubble" ordinance was preliminarily enjoined in two stages, in two separate district court decisions, which led to two separate appeals in the Ninth Circuit, one of which is still pending. First, the district court enjoined the "floating bubbles" as applied to "places of worship." Pet. App. 59a in No. 98-1025. The City appealed that order. Second, after the City took its appeal from the first ruling, but before the Ninth Circuit decided that appeal, the district court enjoined the "floating bubbles" as applied to "health care facilities." Resp. App. 1 in No. 98-1074. The City appealed that order as well, and at the City's request, that second appeal was stayed. Resp. App. 2 in No. 98-1074. That second appeal has not yet been decided. In the first appeal, the Ninth Circuit affirmed in pertinent part, i.e., rejected the City's appeal from the preliminary injunction against floating bubble zones outside places of worship. Pet. App. A in No. 98-1074. Accordingly, the petitioner in No. 98-1074 is the defendant City of Santa Barbara.

OPINIONS BELOW

The petitioner City of Santa Barbara ("City") has not listed all of "the official and unofficial reports of the opinions and orders entered in the case by courts," as required by this Court's rules. *See* Sup. Ct. R. 14.1(d). Rather, the City lists

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[1] "Pet. App." refers to an appendix to a petition for certiorari. "Resp. App." refers to the appendix to the respondents' Brief in Opposition.

only the August 11, 1998 decision of the Ninth Circuit. This omission materially misrepresents the history of the litigation. The course of this somewhat complicated case is therefore set forth *infra*, in respondents' Counter-Statement of the Case.

All decisions in this litigation to date are entitled *Edwards v. City of Santa Barbara*. The decision of the district court initially denying a preliminary injunction is unreported. Pet. App. B in No. 98-1025. The decision of the district court granting the renewed motion for preliminary injunction is reported at 883 F. Supp. 1379 (C.D. Cal. 1995). Pet. App. C in No. 98-1025. The order of the Ninth Circuit vacating and remanding is noted at 70 F.3d 1277 (9th Cir. 1995). Pet. App. D in No. 98-1025. The *first* decision of the district court reissuing the preliminary in part is unreported. Pet. App. E in No. 98-1025. The *second* decision of the district court reissuing the preliminary injunction in remaining part is unreported. Resp. App. 1. The decision of the Ninth Circuit affirming in part and reversing in part the *first* partial reissuance of the preliminary injunction is reported at 150 F.3d 1213 (9th Cir. 1998). Pet. App. A in No. 98-1025. The order of the Ninth Circuit denying rehearing is unreported. Pet. App. H in No. 98-1025. There has been no decision to date in the Ninth Circuit on the City's appeal from the *second* partial reissuance of the preliminary injunction. The Ninth Circuit's order staying proceedings in that appeal is unreported. Resp. App. 2.

JURISDICTION

Petitioner's statement of jurisdiction is incomplete. The constitutional merits of the ordinance provision at issue in No. 98-1074 -- creating floating bubble zones outside any "health care facility" or "place of worship" -- was the subject of two separate district court decisions and two separate appeals to the Ninth Circuit, only one of which has been decided. Petitioner

mentions only the appeal which was decided. As to the other appeal, petitioner could only seek certiorari before judgment. *See* Sup. Ct. R. 11; 28 U.S.C. § 1254(1).[2]

CONSTITUTIONAL PROVISIONS AND ORDINANCE

Petitioner's listing of constitutional provisions and ordinances involved is incomplete. The text of the First and Fourteenth Amendments to the United States Constitution are set forth in Appendix I to the Petition in No. 98-1025. The text of Ordinance No. 4812 of the City of Santa Barbara is set forth in full in Appendix J to the Petition in No. 98-1025.

COUNTER-STATEMENT OF THE CASE

1. Background

Respondents Vickie L. Edwards and Kathleen Rose McCaulley ("Edwards and McCaulley) have engaged in a variety of expressive activities -- distributing leaflets, one-on-one verbal counseling, carrying signs -- on public sidewalks in the vicinity of abortion facilities in Santa Barbara, California. Edwards and McCaulley have at all times conducted themselves in a peaceful and law-abiding manner.

2. Ordinance

On May 18, 1993, the petitioner City of Santa Barbara ("City") adopted the ordinance challenged in the case at bar.

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[2]The City does *not* in fact seek certiorari before judgment. The petition explicitly seeks review of "the judgment and opinion of the . . . Ninth Circuit entered on August 11, 1998." Pet. at 1. *See also* Pet. at 7 ("This Petition seeks review *only* of the portion of the *Ninth Circuit decision* enjoining enforcement of the eight foot back away provision") (emphasis added).

The ordinance ("Ord.") that the City enacted imposes two forms of restrictions on speech, a "demonstration ban" provision (or "driveway provision"), and a "floating bubble" (or "floating buffer") zone provision. Edwards and McCaulley have challenged both provisions under the First and Fourteenth Amendments.

Both ordinance provisions apply to "demonstration activity," which the ordinance defines as follows:

> DEMONSTRATION ACTIVITY. *All expressive and symbolic conduct, whether active or passive*, which shall include, but not be limited to, protesting, picketing, distributing literature, and engaging in oral or silent protest, education or counseling activities.

Ord. § 9.99.010(D) (emphasis added).

a. "Demonstration ban"

The "demonstration ban" states:

> No person shall conduct any *demonstration activity* within the driveway area or within eight (8) feet of the driveway area of a health care facility or place of worship, provided however that it shall be lawful for a person to use a public sidewalk or street right-of-way adjacent to a health care facility or place of worship in order to traverse a driveway area.

Ord. § 9.99.030 (emphasis added).[3] The "driveway area" where the demonstration ban applies includes the public sidewalk crossing a driveway. Ord. § 9.99.010(E). By its terms, the demonstration ban covers the "driveway area" itself, plus the public sidewalk within eight feet of that driveway in any direction. Ord. § 9.99.030. Hence, the ordinance bans "demonstration activity" along stretches of sidewalk extending some twenty-five to thirty feet or more in length, depending upon the width of the "driveway area."

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[3] "**Driveway area**" is defined as:

> DRIVEWAY AREA. That portion of a street right-of-way (including a sidewalk) generally improved for the purposes of providing vehicular access to adjacent private property. At the request of a health care facility or place of worship, the City of Santa Barbara will indicate (such as through the use of painted lines) the perimeter boundaries of a driveway area.

Ord. § 9.99.010(E). "**Health care facility**" is defined as:

> HEALTH CARE FACILITY. Any medical or health facility, hospital or clinic within the City which is licensed under State law or any building, office or other place within the City regularly used by any health care provider licensed under State law to provide medical, nursing, or health care or advice to patients. A health care facility includes but is not limited to any buildings, appurtenances and grounds, entrances, parking facilities, and driveways.

Ord. § 9.99.010(B). "**Place of worship**" is defined as:

> PLACE OF WORSHIP. A place of worship includes but is not limited to any buildings, appurtenances and grounds, entrances, parking facilities, and driveways where persons gather to worship when the same are used solely and exclusively for religious worship.

Ord. § 9.99.010(C).

b. "Floating bubble zone"

The floating bubble zone provision applies in an "access area," which is defined as

> **A. ACCESS AREA.** Any portion of a public street or other public place or any place open to the public within one hundred (100) feet of the premises of a health care facility or place of worship.

Ord. § 9.99.010(A). The floating zone provision states:

> **A. DEMONSTRATION ACTIVITY – OBLIGATION TO WITHDRAW.** No person, in the course of *demonstration activity* within the access area of a health care facility or place of worship, acting alone or in concert with others, shall impede or hamper the free access to or departure from any health care facility or place of worship by failing to withdraw immediately to a distance of at least eight (8) feet away from any person who has requested such withdrawal. "Impede" or "Hamper" means to obstruct, hinder or delay.
>
> **B. WITHDRAWAL.** For the purposes of this Section, withdrawal may be requested by a person verbally, or by carrying or wearing a visible sign clearly indicating such withdrawal request. Statements by a person, or signs carried or worn by a person displaying words or symbols such as or similar in effect to "stop," "stop it," "withdraw," "back off," "get away," or "leave me alone" shall be sufficient to constitute a violation of this Section. Mere statements of opinion or disagreement made in the absence of a request to withdraw shall not be construed to be a request under

this Section.

C. DISTANCE. Distance under this Section shall be measured from that part of the closest demonstrator's body that is nearest to the closest part of the requesting person's body. For purposes of the preceding sentence, the term "body" shall include any natural or artificial extension thereof, including, but not limited to, and outstretched arm or handheld sign.

Ord. § 9.99.020 (emphasis added).

3. Course of litigation

Edwards and McCaulley filed suit in the United States District Court for the Central District of California, challenging the constitutionality of the demonstration ban and the floating zones and alleging that these restrictions chilled and burdened their expressive activities. The district court had jurisdiction under 28 U.S.C. §§ 1331, 1343.

The district court initially declined to grant a preliminary injunction. Pet. App. B in No. 98-1025. Upon consideration of a renewed motion, filed after discovery was conducted, the district court enjoined enforcement of both the demonstration ban and the floating bubble zones. App. C in No. 98-1025.

In its analysis, the district court explained that, under the "extraordinarily broad language" of the definition of "demonstration activity," the ordinance "applies to all conceivable expression." Pet. App. 27a n.6 in No. 98-1025. The demonstration ban (which the district court called the "Driveway Provision") therefore bans

all expressive activity, whether peaceful or harassing,

> vocal or silent, . . . within the eight-foot zone on either side of the driveway leading to the clinic . . ., even silent prayer or expressive t-shirts . . . .
>
> It is axiomatic in American constitutional jurisprudence that the state cannot prohibit all protected forms of expressive activity in a public forum. *See, e.g., Airport Comm'rs v. Jews for Jesus, Inc.*, 482 U.S. 569, 575 (1987) ("We think it obvious that such a ban cannot be justified even if LAX were a nonpublic forum because no conceivable governmental interest would justify such an absolute prohibition of speech") . . . .

Pet. App. 37a-38a in No. 98-1025.

The district court concluded:

> In this case, the Driveway Provision fails to pass muster under the First Amendment because it incorporates the constitutional infirmity of the Ordinance's overbroad definition of demonstration activity and thereby criminalizes the entire universe of expressive activity.

Pet. App. 42a in No. 98-1025.

Turning to the floating zones, the district court noted that these zones apply to "demonstration activity." Pet. App. 43a in No. 98-1025. Thus, "[t]o the extent that the definition of 'demonstration activity' is overbroad, the Bubble Zone provision suffers from the same constitutional infirmity," *id.* Furthermore, the floating zones literally only apply to those engaged in demonstration activity (i.e., expression), and to this extent the ordinance "impermissibly singles out expressive activity" for restriction. *Id.* at 43a n.16. More fundamentally,

the district court held the floating zones to be unconstitutionally overbroad. *Id.* at 45a-49a. The floating zones limit protected speech on the basis of "subjective listener reaction," *id.* at 47a, thus conferring a governmentally enforced audience veto on the speaker's expression in public places, *id.* at 46a, 48a.

The City appealed, and the Ninth Circuit vacated and remanded in light of its own erroneous -- but at the time, not yet corrected -- decision in another case, *Sabelko v. City of Phoenix*.[4] *See Edwards v. City of Santa Barbara*, 70 F.3d 1277 (9th Cir. 1995). Pet. App. D in 98-1025.

On remand, the district court again enjoined enforcement of the "demonstration ban" (or "driveway provision"). App. E in No. 98-1025. As for the "floating zones" (or "bubble zones"), the district court enjoined that provision only as applied to "places of worship," and *not* as applied to "health care facilities." *Id.* at 59a. (The district court felt constrained by the intervening *Sabelko* decision to uphold the floating zones as applied to "health care facilities." *Id.* at 67a-69a.)

The City appealed again.

While the City's appeal was pending, this Court decided *Schenck v. Pro-Choice Network of Western New York*, 519 U.S. 357 (1997), which overturned "floating zones" in an injunction. In light of *Schenck*, this Court vacated, and remanded for further consideration, the Ninth Circuit's *Sabelko* ruling. On remand, the Ninth Circuit reversed itself and overturned the ordinance

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[4]In *Sabelko*, the Ninth Circuit upheld an ordinance imposing floating bubble zones. After remand from this Court, the Ninth Circuit reversed itself. *See Sabelko v. City of Phoenix*, 68 F.3d 1169 (9th Cir. 1995), *vacated*, 519 U.S. 1144 (1997), *on remand*, 120 F.3d 161 (9th Cir. 1997).

imposing floating zones at issue in *Sabelko*. Pet. App. C in No. 98-1074. Plaintiffs Edwards and McCaulley then went back into district court in the present case and secured a preliminary injunction against the Santa Barbara ordinance "as it applies to health care facilities," Resp. App. 1 in No. 98-1074. (This was the only challenged portion of the ordinance *not* enjoined in the district court's prior order on remand. *See* App. E in No. 98-1025.)

The City appealed once more. However, at the City's request, this latest appeal was stayed pending judgment in the City's prior appeal. Resp. App. 2 in No. 98-1074.

In that prior appeal, the Ninth Circuit then proceeded to affirm in part and reverse in part. *Edwards v. City of Santa Barbara*, 150 F.3d 1213 (9th Cir. 1998). Pet. App. A in No. 98-1025. The Ninth Circuit reversed as to the demonstration ban, i.e., upheld the restriction. *Id.* at 5a-6a. The court affirmed as to the floating zones outside places of worship, i.e., struck down that provision. *Id.* at 6a. (The Ninth Circuit noted that the question of the constitutionality of floating zones outside health care facilities was not part of the appeal it was deciding but rather had been the subject of subsequent district court proceedings. *Id.* at 5a n.5. Hence, the Ninth Circuit did not decide that issue, which remained pending in a separate appeal. *See* Resp. App. 2 in No. 98-1074.)

Edwards and McCaulley filed a timely petition for rehearing as to the demonstration ban, which the Ninth Circuit denied. Pet. App. H in 98-1025.

Edwards and McCaulley next filed a petition for a writ of certiorari (No. 98-1025) on the constitutionality of the "demonstration ban." The City followed with its own petition for certiorari (No. 98-1074) on the floating zones.

REASONS FOR DENYING THE WRIT

This Court should deny the City's petition for certiorari for the following reasons:

- The City's petition does not comply with this Court's rules.

- The City's petition does not request review before judgment, yet the issue the petition addresses (floating bubble zones outside "health care facilities") was not decided by the Ninth Circuit; rather, that issue is the subject of a separate appeal not yet decided by the court below.

- There is no conflict warranting review.

- The decision below was plainly correct insofar as it overturned "floating bubble zones" on public sidewalks.

- The decision below is fully justifiable on additional, alternative grounds.

I. THE CITY'S PETITION DOES NOT COMPLY WITH THIS COURT'S RULES.

Noncompliance with this Court's rules justifies the denial of certiorari:

> The failure of a petitioner to present with accuracy, brevity, and clarity whatever is essential to ready and adequate understanding of the points requiring consideration is sufficient reason for the Court to deny

a petition.

Sup. Ct. R. 14.4. The City's petition is defective in multiple respects. Most notably, the petition fails to mention or include in the appendix several important decisions in the lower courts, contrary to Rules 14.1(d) and 14.1(i)(ii). The petition fails to mention, *contra* Rule 14.1(e), that the issue to which the City's arguments are devoted -- the constitutionality of floating bubble zones outside "health care facilities" -- was *not* before the Ninth Circuit in the appeal that court decided but rather was -- and is -- the subject of a *separate* appeal still pending in that court. As noted earlier, the listing of constitutional provisions and statutes involved is incomplete, *contra* Rule 14.1(f), and the statement of the case is incomplete to the point of being positively misleading, *contra* Rule 14.1(g). (The City mentions that it appealed twice from district court injunctions issued after the Ninth Circuit's initial remand. Pet. at 6, 7. The City fails to mention that the second appeal was *not* consolidated with the first and has *not* been decided by the Ninth Circuit. *See generally* Respondents' Counter-Statement of the case, *supra*.)

II. THE CITY DOES NOT SEEK OR CLAIM TO SEEK CERTIORARI BEFORE JUDGMENT AND IN ANY EVENT DOES NOT MAKE A SHOWING OF IMPERATIVE PUBLIC IMPORTANCE IN IMMEDIATE DETERMINATION BY THIS COURT.

The City's petition is devoted almost exclusively to the question of the constitutionality of floating bubble zones outside "health care facilities." That portion of the ordinance, however, was *not* enjoined by the district court and *not* addressed by the Ninth Circuit in the decision for which petitioners seek review. *See* Pet. App. 59a in No. 98-1025; Pet. App. 5a n.5 in No. 98-1074. Rather, that provision was enjoined in a later order, Resp.

App. 1, which is the subject of a separate appeal still pending in the Ninth Circuit, Resp. App. 2.

At best, then, the City's petition *could* have sought certiorari, before judgment, in that *different* case, still pending before the Ninth Circuit. The City failed even to mention that other appeal in its petition, however. On the contrary, the City expressly limited its petition to seeking review of the Ninth Circuit's *decision* which overturned the floating zones *outside places of worship, not health care facilities*. *Supra* note 2. In any event, certiorari before judgment is disfavored and

> will be granted only upon a showing that the case is of such imperative public importance as to justify deviation from normal appellate practice and to require immediate determination in this Court.

Sup. Ct. R. 11. The City has not even attempted to make such an extraordinary showing.

III. THERE IS NO CONFLICT WARRANTING REVIEW.

The City has identified no conflict in the circuits on the constitutionality of floating anti-speech bubble zones. On the contrary, the circuits and the state courts are uniform in rejecting such zones. *See Lucero v. Trosch*, 121 F.3d 591, 607 (11th Cir. 1997) (overturning "floating 20-foot buffer zone" provision of injunction in light of *Schenck*); *Planned Parenthood Ass'n of San Mateo County v. Operation Rescue of California*, 50 Cal. App. 4th 290, 303-04, 57 Cal. Rptr. 2d 736, 744 (1996) (overturning injunctive provision forbidding "'approaching'" abortion business staff or patients "'once that person has made it unmistakably clear that he or she does not wish to be approached'" because that provision "limits speech to that

consented to by the listener" and burdens "peaceable but unwelcome" speech), *cert. denied*, 118 S. Ct. 54 (1997); *Sabelko v. City of Phoenix*, 120 F.3d 161, 163 n.1, 165 (9th Cir. 1997) (overturning eight-foot "floating buffer provision" in ordinance because it imposes "a broad prohibition on speech with which it is difficult to comply" and gives audience veto power "effectively preventing handbilling and normal conversation"). *See also United Food and Commercial Workers Int'l Union v. IBP, Inc.*, 857 F.2d 422, 425 n.4, 435 (8th Cir. 1988) (overturning statutory ban on "'persisting in talking to or communicating in any manner with'" a person or persons "'against his, her or their will'" in order to persuade that person or persons to quit or refrain from seeking certain employment: "as written this clause plainly runs afoul of the First Amendment"); *Fargo Women's Health Organization, Inc. v. Lambs of Christ*, 488 N.W.2d 401, 407 n.1, 411 (N.D. 1992) (overturning, as violative of the First Amendment, an injunctive ban on "'speaking to staff and patients . . . who indicate that they do not wish to be spoken to'" and "'distributing leaflets or brochures to any person who has indicated orally or by gesture that such person does not wish to receive such literature'").[5]

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[5]One lower court strayed twice from this consensus, and the matter is now pending before the Supreme Court of Colorado. *Hill v. City of Lakewood*, 911 P.2d 670 (Colo. Ct. App. 1995), *vacated sub nom. Hill v. Colorado*, 519 U.S. 1145 (1997), *on remand*, 949 P.2d 107 (Colo. Ct. App. 1997), *cert. granted, id.* (Colo. argued Oct. 19, 1998). Should that state supreme court depart from the consensus and uphold the floating bubble zone statute at issue, review of that case would be appropriate. But that conflict has not yet materialized, nor should this Court assume that the Supreme Court of Colorado will fail to be as vigilant as the other lower courts (and this Court) in rejecting floating anti-speech zones.

IV. THE DECISION BELOW WAS PLAINLY CORRECT.

In *Madsen v. Women's Health Center, Inc.*, 512 U.S. 753 (1994), this Court struck down an injunctive version of floating personal no-speech zones. That "no approach" provision forbade "physically approaching any person seeking services" at an abortion business "unless such person indicates a desire to communicate," *id.* at 760. This injunctive provision applied to *all* communications, however peaceful. Further, this restriction made the speakers' right to communicate dependent upon the consent of the audience. This Court held that these features doomed the *Madsen* "no approach" provision:

> [I]t is difficult, indeed, to justify a prohibition on *all* uninvited approaches of persons seeking the services of the clinic, regardless of how peaceful the contact may be, without burdening more speech than necessary to prevent intimidation and to ensure access to the clinic. Absent evidence that the protesters' speech is independently proscribable (i.e., "fighting words" or threats), or is so infused with violence as to be indistinguishable from a threat of physical harm, . . . this provision cannot stand. As a general matter, we have indicated that in public debate our own citizens must tolerate insulting, and even outrageous, speech in order to provide adequate breathing space to the freedoms protected by the First Amendment. . . . The "consent" requirement alone invalidates this provision; it burdens more speech than is necessary to prevent intimidation and to ensure access to the clinic.

Id. at 774 (internal quotation marks, citations, and footnote omitted; emphasis in original).

In *Schenck v. Pro-Choice Network of Western New York*, 519 U.S. 357 (1997), this Court struck down another floating bubble zone, this one also contained within an injunction. This provision banned "demonstrating . . . within fifteen feet of any person or vehicle seeking access" to abortion businesses, subject to an exception for two sidewalk counselors. *Id.* at 366 n.3. The audience had the power to veto even these two counselors' speech, at which point the fifteen-foot no-speech bubble would apply to these speakers as well. *Id.* Despite a record of "extraordinary" lawlessness by protesters, *id.* at 383, 377, this Court invalidated a floating zone imposed upon the very persons found to have engaged in misconduct.

> The floating buffer zones prevent defendants -- except for two sidewalk counselors, while they are tolerated by the targeted individual -- from communicating a message from a normal conversational distance or handing leaflets to people entering or leaving the clinics who are walking on the public sidewalks. This is a broad prohibition, both because of the type of speech that is restricted and the nature of the location. Leafletting and commenting on matters of public concern are classic forms of speech that lie at the heart of the First Amendment, and speech in public areas is at its most protected on public sidewalks, a prototypical example of a traditional public forum. . . . We need not decide whether the governmental interests involved would ever justify some sort of zone of separation between individuals entering the clinics and protesters, measured by the distance between the two. We hold here that *because this broad prohibition on speech "floats,"* it cannot be sustained on this record.

Id. at 377 (emphasis added). This Court went on to catalogue the nightmarish difficulty of complying with floating zones. *Id.*

at 377-78. "This lack of certainty leads to a substantial risk that much more speech will be burdened than the injunction by its terms prohibits." *Id.* at 378.

The ordinance in the present case imposes floating bubble zones that plainly violate the norms of *Madsen* and *Schenck*. As in *Madsen* and *Schenck*, the challenged zones restrict even entirely peaceful speech.[6] The floating zones make leafletting impossible. (This is clearly deliberate. The ordinance explicitly measures the eight-foot no-speech zone from any "outstretched arm," Ord. § 9.99.020(C), i.e., from a hand offering a leaflet.) As in *Madsen* and *Schenck*, the challenged zones subject the speaker to the consent of the listener, i.e., impose an audience veto on speech in a public forum sidewalk. And, as in *Schenck*, the zones "float" with the person invoking the bubble, making compliance exceedingly difficult and thereby burdening even more speech.[7]

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[6]A separate provision of the Santa Barbara ordinance provides:

> No person shall impede access to a driveway entrance of a health care facility or place of worship by any conduct which delays or impedes the flow of pedestrian or vehicular traffic in or out of such facility.

Ord. § 9.99.030. Edwards and McCaulley do not challenge this provision. Pet. App. 44a n.17 in No. 98-1025; *id.* at 60a n.2. Hence, the City's constant refrain about the need to remedy obstruction and interference is purely a red herring. *See* Pet. at 4-5 & n.1, 8-17. Moreover, the misconduct allegedly perpetrated was by people other than Edwards and McCaulley. Pet. at 5 n.2. The United States is not a nation where the misconduct of *some* people justifies the suspension of the free speech rights of *all* people. *See, e.g., NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982).

[7]The City's efforts to distinguish *Schenck* fail. The City argues that under the Santa Barbara ordinance, a floating bubble zone ban on leafletting and

(continued...)

The City makes much of the fact that injunctions trigger a higher standard of scrutiny than ordinances. *See Madsen*, 512 U.S. at 765. But the concerns this Court identified as constitutional flaws in the floating zones in *Madsen* and *Schenck* -- overbreadth, vagueness, imposition of a listener consent requirement -- are also fatal to ordinances and statutes. *E.g.*, *Thornhill v. Alabama*, 310 U.S. 88 (1940) (overbreadth doomed statute); *Kolender v. Lawson*, 461 U.S. 352 (1983) (vagueness doomed statute); *Forsyth County v. Nationalist Movement*, 505 U.S. 123 (1992) (risk of audience veto doomed ordinance). If anything, the present ordinance *more flagrantly* violates the constitutional right to free speech because it *restricts everybody*, not just those particular individuals whom a court has adjudicated as lawbreakers or abusers of the right to protest.[8]

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[7](...continued)
conversation only becomes effective upon request, only applies to the requesting individual, and may be waived to allow acceptance of a leaflet. Pet. at 15. But the same was true in *Schenck*. *See* 519 U.S. at 364 & n.1, 366 n.3, 367, 377.

[8]The City misleadingly states that the ordinance "requires a demonstrator *who is impeding access* . . . to back off eight feet if a person specifically requests the space." Pet. at 4 (emphasis added). *See also id.* at 12 (falsely implying ordinance only applies to an "obstructive protester"); *id.* at 16 (same). In fact, the ordinance applies to *any* person "in the course of demonstration activity," Ord. § 9.99.020(A), and categorically *deems* the "fail[ure] to withdraw immediately to a distance of eight (8) feet" *to be* "imped[ing] . . . access," *id.* The ordinance thus equates "failing to withdraw" with "impeding," as the district court noted. Pet. App. at 44a n.18 in No. 98-1025. *See also* Appellant City's Opening Brief in *Edwards v. City of Santa Barbara*, Nos. 96-56790, 96-56262, 96-56558 (Dec. 2, 1996), at 33 (City admits that floating zones of Santa Barbara ordinance impose "eight-foot 'no speech' proscriptions effective within 100 feet of these special places").

V. THE DECISION BELOW IS ALSO FULLY SUPPORTABLE ON ALTERNATIVE GROUNDS.

Review is also unwarranted because the floating bubble zone ordinance here already suffers from additional constitutional defects that require its invalidation. Thus, the judgment below would have to be affirmed in any event on alternative grounds.

The floating zones apply only to people "in the course of demonstration activity," i.e., these zones burden speech and only speech. Ord. § 9.99.020(A). The speech in question -- demonstration activity -- is defined to encompass the universe of expression, including even t-shirts, buttons, leafletting, and "silent protest." *See* Ord. § 9.99.010(D). Hence, the floating bubble zones incorporate -- and burden -- a class of speech that covers the universe of expressive activity. Pet. App. 27a n.6, 37a-42a in No. 98-1025. A provision that "criminalizes the entire universe of expressive activity," *id.* at 42a, cannot pass muster even in a nonpublic forum, *Board of Airport Comm'rs v. Jews for Jesus, Inc.*, 482 U.S. 569 (1987), much less in a traditional public forum sidewalk.

Finally, the ordinance imposes criminal liability based upon an unconstitutionally vague distinction. A listener's "words or symbols such as or similar in effect to 'stop,' . . . 'back off,' 'get away,' or 'leave me alone'" count as a request which triggers the floating zones, Ord. § 9.99.010(B), while "[m]ere statements of opinion or disagreement" do *not* trigger a zone, *id.* This "distinction" is obscure in theory as well as in practice. For example, "Get out of here" could easily mean either "I'm not convinced" or "Please leave." A wave of the hand can be even more ambiguous. The speaker, however, risks criminal (and civil) liability for incorrectly interpreting these and a myriad of other "words or symbols." Hence, the floating

zones are unconstitutionally vague.

CONCLUSION

This Court should deny the City's petition in No. 98-1074.

Respectfully submitted,

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February 3, 1999

APPENDICES

APPENDIX 1

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

Case No. CV 94-2243 RSWL

VICKIE L. EDWARDS, *et al.*,

Plaintiffs,

v.

CITY OF SANTA BARBARA, *et al.*,

Defendants.

ORDER GRANTING A PRELIMINARY INJUNCTION

Lodged September 26, 1997
Signed October 6, 1997
Entered October 7, 1997

Pursuant to notice, plaintiffs' motion for a preliminary injunction to enjoin enforcement of the Bubble Provision, § 9.99.020, of Santa Barbara Ordinance No. 4812, as it applies to health care facilities, came on for hearing on September 15, 1997. Based on the Court's review and consideration of the record in this case, and of the moving, opposition, and reply papers, and good cause found therefore, this Court finds that the Bubble Provision (§ 9.99.020) of Santa Barbara Ordinance No.

4812, as it applies to health care facilities, violates the Free Speech Clause of the First Amendment of the United States Constitution. The Court further finds that the plaintiffs have satisfied the requirements for a preliminary injunction; to wit, the plaintiffs have demonstrated a likelihood of success on the merits, and have suffered and will continue to suffer irreparable injury unless a preliminary injunction is granted.

THEREFORE, IT IS HEREBY ORDERED that:

1. The plaintiffs' motion for a preliminary injunction enjoining enforcement of the Bubble Provision, § 9.99.020, of Santa Barbara Ordinance No. 4812, as it applies to health care facilities, is **GRANTED**;

2. The surety bond previously given by the plaintiffs shall be adequate security for the preliminary injunction.

IT IS SO ORDERED.

Dated: Oct. 6, 1997

/s/ Ronald S. W. Lew
Ronald S. W. Lew
United States District Judge

APPENDIX 2

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 97-56485

VICKIE L. EDWARDS, *et al.*,

Plaintiffs-Appellees,

vs.

CITY OF SANTA BARBARA,

Defendant-Appellant.

and

HAL CONKLIN, in his official capacity as Mayor of the City of Santa Barbara, *et al.*,

Defendants.

ORDER

Filed December 9, 1997

Before: Peter L. Shaw, Appellate Commissioner

Appellant's motion to stay appellate proceedings is granted in part.

This appeal is stayed pending entry of judgment in appeal nos. 97-56790, 96-56262, and 96-56558. Within seven days from the entry of judgment in these consolidated cases, appellant shall notify this court of the entry to facilitate docketing of the briefing schedule in this appeal.

Appellant's opening brief is due 21 days after the entry of judgment in appeal nos. 97-56790, 96-56262, and 96-56558. Appellees' answering brief is due 21 days after the opening brief is filed. Appellant's optional reply brief is due within 14 days of service of the answering brief.

/s/ Peter L. Shaw
General Order 6.3(e)